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JAMES D. MAHER,
CLERK**SUPREME COURT OF THE UNITED STATES.**

No. 187.

SEUFERT BROTHERS COMPANY, APPELLANT,*vs.*

THE UNITED STATES OF AMERICA AS TRUSTEE AND GUARDIAN OF THE CONFEDERATED TRIBES AND BANDS OF THE YAKIMA INDIANS AND NATIONS, AND AS TRUSTEES AND GUARDIAN OF AND EX REL. SAM WILLIAMS, AND SAM WILLIAMS.

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*vs.***SEUFERT BROTHERS COMPANY.**

**REPLY BRIEF FOR
SEUFERT BROTHERS COMPANY**

**APPEALS FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF OREGON.**

**A. S. BENNETT and
H. S. WILSON.**

Attorneys for Appellants,
SEUFERT BROTHERS COMPANY.

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Treaties not cited heretofore or if cited not quoted as fully as in this brief. Sale of Wenatschapam fishery, Kappler's Indian Treaties, Vol. 1, page 529, Senate Document —, Vol. 34, page 529. Cession of fishery right by Middle Oregon Tribe, 14 Stat. Large, 75 N.

In our original Brief on pages 18 and 19 is to be found a quotation which is attributed to the 119th U. S. page 1. This is an error. The quotation is taken from a case with the same title but it is to be found in the 179th U. S. 494. The quotation is correct, but it is attributed to the wrong case.



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REPLY BRIEF FOR SEUFERT BROTHERS COMPANY

I.

In its attempt to construe the Treaty in question, so as to give the Yakima Nation the right to take fish on the Oregon side of the Columbia River, and IMPOSE THE SAME SERVITUDE UPON ITS SOIL

AS IS IMPOSED UPON THE SOIL OF THE STATE OF WASHINGTON, the plaintiff argues that the matter of the boundary of the country included within a treaty with the Indians was not of much importance either to the Government or to the Indians.

It is manifest, we think, that it is of the greatest importance that the boundaries be exact and that they be agreed upon and understood.

1. As already suggested by us it is necessary in order to extinguish Indians rights to land to have the relinquishment of such rights executed by the Indians claiming them—otherwise no rights are extinguished.

The fact that all the Indian country is covered by relinquishment from various tribes amounts to nothing, unless the relinquishments are executed by the owners of such rights.

2. It is also necessary in order to prevent conflicting treaty claims by the Indians.

Further it is necessary in order to indicate with certainty to settlers what lands had a servitude imposed upon them by treaty, inasmuch as such settlers are guaranteed by the treaty in question the right to occupy ANY LAND not actually occupied and cultivated by the treaty-making Indians at the time of the making of the treaty and not included in Reservation and generally that the application, scope and meaning of this Treaty which is a part of the supreme law of the land may be understood.

The treaty in question contains indisputable proof that both the Government and the Indians appreciated the necessity of fixing and understanding the limits and location of the country affected by the treaty.

The opening statement of the Yakima Treaty is as follows:

"Articles of agreement and convention made and concluded at the Treaty Ground, Camp Stevens, Walla Walla Valley, this 9th day of June, in the year 1855, by and between Isaac L. Stevens, Governor and Superintendent of Indian Affairs for the Territory of Washington on the part of the United States and the undersigned head chiefs, headmen and delegates of the Yakima, etc., etc. confederated tribes and bands of Indians occupying the lands hereinafter BOUNDED AND DESCRIBED AND LYING IN WASHINGTON TERRITORY, who for the purposes of this treaty are to be considered one nation under the name of Yakima with Kamiakum as its head chief on behalf of and acting for said tribes and bands and being duly authorized thereto by them."

From the foregoing we learn and the Indians must have understood that the Government was acting through the Governor of the Territory of Washington and Superintendent of Indian Affairs for the Territory.

That the Indians dealt with occupied lands hereinafter bounded and described, and LYING IN WASHINGTON TERRITORY. Article I of said treaty is as follows:

Article I. The aforesaid confederated tribes and bands of Indians hereby cede, relinquish and convey to the United States ALL THEIR RIGHT, TITLE AND INTEREST IN AND TO THE LANDS AND COUNTRY OCCUPIED AND CLAIMED BY THEM, AND BOUNDED AND DESCRIBED AS FOLLOWS, TO-WIT:"

It is to be noted that by this Article the Yakima confederated tribes convey ALL THEIR RIGHT, TITLE AND INTEREST IN AND TO THE COUNTRY OCCUPIED AND CLAIMED BY THEM.

It follows that the Indians here agreed and understood they did not claim any rights in any lands outside of the territory "hereinafter bounded" or outside of Washington Territory and a right TO IMPOSE A SERVITUDE UPON OREGON SOIL would be such a right however expressed.

The boundary commences at Mt. Ranier and omitting most of the description the last part of the same is as follows:

"Thence down the Snake River to its junction with the Columbia River; thence up the Columbia River to the 'White Banks' below the Priests Rapids; thence westerly to a lake called 'La Lac', thence southerly to a point on the Yakima River called Toh-mak-luke; thence in a southwesterly direction to the Columbia River at the western extremity of the 'Big Island' between the mouths of the Umatilla River and Butler Creek; all of which latter boundaries separate the above confederated tribes and bands from the Walla Walla, Cayuse and Umatilla tribes and bands of Indians; thence down the Columbia River to midway between the White Salmon and Wind River; thence along the divide between said rivers to the main ridge of the Cascade mountains and thence along said ridge to the place of beginning."

It is to be noted in this description that where the boundary lines do not consist of some natural object that it is frequently said that such boundary lines separate the federated tribes and bands of Yakima Indians from certain other named tribes of Indians thus evincing the most scrupulous care to indicate to the Indians the exact boundary of the country ceded.

This treaty was signed by fourteen chiefs and witnessed by nine different persons, among whom was General Joel Palmer, Indian Superintendent for Ore-

gon Territory and who on June 25, 1855, in behalf of the Government negotiated a treaty with the Middle Oregon Indians.

This treaty with the Yakimas was ratified by the Senate March 8, 1859 by resolution which reads as follows :

“IN EXECUTIVE SESSION

Senate of the United States, March 8, 1859.

Resolved, (two-thirds of the Senators present concurring) That the Senate advise and consent to the ratification of the treaty between the United States and the head chief, chiefs, headmen and delegates of the Yakima, Palouse, and other confederated tribes and bands of Indians OCCUPYING LANDS LYING IN WASHINGTON TERRITORY, under the name of ‘Yakima’ with Kamaiakum as its head chief, signed 9th June 1855.

ASBURY DICKENS, Secretary.

Attest :

(12 U. S. Stat. at Large 955.)

All persons and all bodies, including the Senate of the United States understood that the Yakima Indians by this Treaty claimed no right outside of the ceded territory and least of all did they think that such Indians had a right under this treaty to impose a servitude upon Oregon soil.

The Senate understood that the lands affected were situated in Washington territory.

The treaty with the Middle Oregon Indians describes them as confederated bands and tribes of Indians residing in Middle Oregon, and by Article I of that treaty executed June 25, 1855 said confederated tribes and bands of Indians ceded to the United States “ALL THEIR RIGHT, TITLE AND INTEREST IN AND TO EVERY PART OF THE COUNTRY CLAIMED

BY THEM", and in bounding the ceded territory the northern line runs "down the channel of the Columbia River" thus making the north line of the country ceded by the Middle Oregon Indians the same as the south line of the territory ceded by the Yakimas.

There is the same exclusive right of taking fish as in the Yakima treaty, the treaty reading:

"Provided that the exclusive right of taking fish in the streams running through and bordering said Reservation is hereby secured to said Indians and at all other usual and accustomed stations in common with the citizens of the United States, and of erecting suitable houses for curing the same."

There was a treaty negotiated by the Nez Perce Indians on the 11th of June 1855—Stat. at Large, Vol. 12, page 957 and the subject matter of the Treaty was identified by referring to the Nez Perces as a tribe occupying lands lying partly in Washington Territory and partly in Oregon Territory—the Senate's ratification also so identified the subject matter of the Treaty.

In this treaty the United States was represented and acted through Isaac Stevens, Governor of the Territory of Washington and Superintendent of Indian Affairs for that Territory, and the United States was also represented and acted through General Palmer, Superintendent of Indian Affairs for Oregon Territory.

As shown by this Treaty Governor Stevens treated only with the Indians residing in Washington Territory and General Palmer only with the Indians residing in Oregon Territory.

If Indian rights located in Oregon or rights of Oregon Indians had been dealt with or touched upon in the Yakima Treaty General Palmer would have treated

with the Oregon Indians and they would have been a party to the Treaty.

As further bearing upon our contention that the Indians understood their boundaries and that in treating with any given tribes in one treaty the contract was confined and limited to the lands ceded, we quote from the treaty between the United States and the Middle Oregon Indians whereby they relinquished whatever fishing rights were secured to them in common with citizens of the United States (14 Stat. at Large, page 75).

“Article I. It having become evident from experience that the provisions of Article I of the Treaty of the 25th of June 1855 which permits said confederated tribes TO FISH, hunt, gather berries and nuts, pasture stock and erect houses on lands outside the Reservation AND WHICH HAVE BEEN CEDED TO THE UNITED STATES is often abused by the Indians, etc. Therefore it is hereby stipulated and agreed that all the rights enumerated in the third proviso of the first section of the beforementioned treaty of the 25th of June 1855, that is to say the right to take fish and erect houses, hunt game, gather nuts and berries and pasture animals without the Reservation set apart by the treaty aforesaid are hereby relinquished by the confederated Indian tribes and bands of Middle Oregon parties to this treaty.”

Here we find a flat declaration that the fishing rights of the Middle Oregon Indians secured to them to be exercised in common with citizens is confined to land ceded.

This is a demonstration that the meaning of the Middle Oregon Treaty is as we contend and it seems to us conclusive as to the meaning of like fishing clauses in the Yakima Treaty.

Is it not clear from a reading of the Treaty provisions that all fishery rights reserved to the confederated tribes in the Yakima Treaty were to be exercised within the territory claimed and occupied by the contracting Indians and by them ceded to the United States?

The above quotation from the Treaty of '65 fully supports our Original Brief, although the headline was not a quotation from the Treaty.

II.

The Government's contention results in imposing a servitude upon Oregon soil, although the Treaty mentioned land lying in Washington Territory only. THE RIGHT TO FISH ON THE OREGON SIDE OF THE COLUMBIA UNDER THE TREATY WHETHER EXPRESSED IN THE DECREE OR NOT CARRIES WITH IT THE RIGHT OF INGRESS AND EGRESS AND THE RIGHT TO BUILD TEMPORARY STRUCTURES FOR THE PURPOSE OF CURING FISH AND IT IS SO EXPRESSED IN THE DECREE.

It is beyond challenge that the treaty itself wherever it gives the Indians the right to fish also gives them ingress and egress and the right to build temporary structures.

It is said in the case of *United States vs. Winans*, 198 U. S., page 381:

"There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved in common with the citizens of the Territory. * * * They were given the right of taking fish in all usual accustomed places and the right of erecting temporary buildings for curing them."

Two lots belong to Seufert Brothers Company are described in the decree as lots upon which a servitude is imposed and further a construction of this treaty in conformity with the Government contention would leave it open to the Yakima Indians to contend that any place along the Columbia River on the Oregon side or elsewhere was the usual and accustomed place of taking fish and if such contention were upheld a servitude would be imposed upon the Oregon soil adjacent or upon the soil of any State.

Quoting further from the *Winans* case, *supra*, page 381, it is said:

“Reservations were in large areas of territory and the negotiations were with the tribe. They reserved rights, however, to every individual Indian as those named therein. They imposed a servitude upon every piece of land as though described therein.”

Considering the fact as shown above that the Indians ceded to the United States all their right, title and interest in and to the country claimed and occupied by them, it would be a contradiction to put into this treaty, by inference, a description of land lying outside of the territory ceded and in another State as land upon which a servitude was imposed by the treaty.

The rights secured to the Indians were rights to be exercised upon territory formerly claimed and occupied by them which they had ceded to the United States. Any sentence which when taken alone might indicate otherwise is to be read in connection with the matter about which the Indians were talking. One good illustration is to be found in that portion of the Yakima Treaty wherein citizens are guaranteed the right to settle upon any lands ~~not~~ outside the reservation at the time of the execution of the treaty occupied and culti-

vated by the confederated tribes and bands of Indians making the treaty.

Did the Government throw open for settlement every piece of land in the United States not at the moment in the occupancy and being cultivated by the Yakima Indians? Certainly not. This clause in the treaty refers to any territory ceded by the said treaty and outside Reservation not occupied and cultivated by the Indians and this meaning is just as plain the way it is expressed as it could be ^{by} all Indians, both white men and Indians, knew what lands they were talking about. The meaning was consequently clear.

In further argument of our contention that the Yakima Indians are confined in their fishing under their treaty to the Washington side of the Columbia River and upon incidental questions, we suggest:

III.

DEFENDANT'S CONSTRUCTION OF THE TREATY FAVORS THE YAKIMA INDIANS AND IS NOT AGAINST THEIR INTEREST AS IT EXCLUDES ALL OTHER INDIANS FROM FISHING ON THE NORTH BANK OF THE COLUMBIA RIVER WHICH IS BY FAR THE BETTER FISHING GROUND THAN THOSE OF THE SOUTH SIDE.

Such construction while it excludes the Yakima from the poorer fishing grounds on the south bank also excludes the Middle Oregon tribes and all other tribes from the GOOD FISHING PLACES ON THE NORTH BANK.

It must have been manifest to the Indian mind that, when to the confederated Yakima Indian Tribes there was secured the exclusive right to take fish from streams running through or bordering the Reser-

vation, that no other person could participate in that right and equally plain that where a right was secured to the confederated Yakima Tribe take fish in common with citizens that no other Indians could participate in that right.

Again as the fishing right so secured excluded other Indians the right so secured was one that was to be exercised in common with citizens only, not in common with citizens and other Indians.

The contention on the part of the Government results in violating the terms of the treaty and compelling the confederated tribes to share their fishing rights with the Wascos while the contention on the part of Seufert Brothers Company results in the harmonious construction of the treaty leaving the several contracting bands of Indians, in the several treaties, rights to be exercised in the country formerly occupied and claimed by them and which they have ceded and denying them the authority to go upon land ceded by other Indian tribes and there exercise alleged treaty rights of their own in violation of the treaty rights of the Indians who formerly occupied such territory. It is to be borne in mind that the treaty with the Yakimas and the treaty with the Middle Oregon tribes was of like nature and that in construing these treaties we are not only construing the Indians' rights as between citizens and Indians but we are construing the rights of different treaty-making Indians between themselves and that in making construction of the Yakima treaty when taken in connection with the treaty of the Middle Oregon Indians as we must, we are confronted with the question of construing these treaties between the Indians and in determining what right the Indians, as between themselves, have thereunder and if we were left to construe each of these treaties as each of these

unlettered people might now say they understood these several treaties we would find ourselves in the worst sort of confusion.

In construing the Yakima Treaty in favor of the Yakima Indians plaintiff seeks to give him fishing rights in the country ~~ceded and~~ occupied by and afterward ceded ~~the~~ the Middle Oregon tribes and this to the detriment of the Middle Oregon tribes as the value of this fishery right of theirs would be thereby diminished.

In construing the treaty right of the Middle Oregon tribes a like construction would give such Indians fishing rights on the Washington side of the river to the detriment of the rights secured to the Yakimas in their treaty.

Again if one guided by the interest of the Indians making the treaty should also in his construction of the same take into consideration the interests and rights of Indians not parties to the particular treaty being construed such a course would lead to a denial of the Yakima Indians to exercise any right out of the territory ceded and bounded by the treaty. If the Government's contention in this regard be upheld there would be the utmost confusion caused by conflicting claims both between Indians and Indians and citizens.

The chief interest of the defendants herein is in the result that would flow from the Government's contention and not in the particular fishery described in the decree and we ought to say that other citizens have made permanent improvements the value of which would be jeopardized by the application of the Government's construction of this treaty.

The mere fact that the Middle Oregon tribes relinquished their fishing rights in the territory ceded by them and outside of their Reservation, of course is of no importance in the construction of the Yakima Treaty.

We think it is clear that these treaties must be construed the same way whether the question arises between a citizen and an Indian or between Indians solely and that the defendant's construction must prevail as the one demanded by reason and justice and as the one in harmony with the wording of the Treaty.

If the Yakima had claimed country on the Oregon side and the Wascos and the Middle Oregon tribes on the north side a treaty could have been entered into combining the different tribes and in which all would have been parties and there could have been indicated the fact if so desired, that the contracting Indians had common rights between themselves and as between themselves and citizens, and this would certainly have been done if the Government had had the remotest idea, either when the treaty was ratified or when it was executed by the Indians, that such a claim would be made.

IV.

THE TREATY RIGHT OF TAKING FISH WAS A VALUABLE ONE AS CONTENTED IN BRIEF OF PLAINTIFF.

IT IS TO BE REMEMBERED, HOWEVER, THAT THIS RIGHT WAS SECURED TO THE INDIANS TO SATISFY THEIR PRIMITIVE WANTS AND DID NOT CONTEMPLATE COMMERCIAL FISHING AS CARRIED ON TODAY. IN THE SAME TREATY THERE WAS SET APART AS THE EXCLUSIVE FISHERY OF THE CONFEDERATED TRIBES OF THE YAKIMA INDIANS, THE SO-CALLED WENATSHAPAM FISHERY. This fishery was ceded back to the Government on January 8, 1894 for \$20,000 (see Kapplers Indians, Vol. 1, page 529, Senate Documents, Vol. 34, page 529.)

The fishing privileges of the Yakima Indians on the north bank of the Columbia and opposite the places in controversy are very productive so that they sell thousands of dollars worth of fish each year which are put up in canneries. They have no need of the Wenatshapam fishery as the fishery which is theirs beyond challenge on the north bank furnishes more fish than they can use and many tons for sale.

The Indians are paid many thousands of dollars each year by the Seufert Brothers Company, the fish being caught by the Indians on the north bank of the river. This evidence is again referred to on another point.

This argument indicates merely that the Yakimas have no need to fish on the Oregon shore.

V.

THE PRESENT SUIT WAS COMMENCED SOLELY TO ENABLE SAM WILLIAMS TO USE THE POINT MARKED ON THE ROCKS AND LOCATED AS 12 CHAINS WEST AND 28.53 CHAINS NORTH OF THE $\frac{1}{4}$ SECTION CORNER BETWEEN SECTIONS 1 AND 36, TOWNSHIPS 1 AND 2 NORTH, RESPECTIVELY BOTH OF RANGE 13 E. W. M. IN WASCO COUNTY, OREGON, he seeking there to use a monopolistic device in the form of a scow fishing wheel and only upon failure to accomplish that purpose was the amendment made bringing in the Yakima Nation.

Having failed as far as Williams was concerned the United States commenced another case for him and was defeated both in the Federal District Court and in the Circuit Court of Appeals.

(See *United States as Guardian and Trustee of Sam Williams vs. Seufert Brothers Company*, 252 Fed. page 51.)

The decision in the lower Court and in the Circuit Court of Appeals were both against Williams. He then commenced a suit in the Circuit Court of the State of Oregon for *Multnomah County vs. Seufert Brothers Company* and members of the Fish and Game Commission for the State of Oregon for the purpose, among other things, of compelling the issuance of a license allowing him to fish at the identical point described as 12 chains West, etc.

Williams in his complaint set up the fact that he was a citizen of the State of Oregon and did not refer at all to the fact that he was an Indian or mention any right claimed as an Indian but sued simply as a citizen of the State of Oregon.

Williams having prevailed in the Lower Court the case was appealed and is now pending in the Supreme Court of the State of Oregon. The case is not reported of course but we have for inspection the printed Abstract of Appeal.

We cite this case to show that the United States is mistaken in its efforts as to Sam Williams and equally likely to be mistaken in its contention concerning other alleged fishing and to show that Sam Williams as a citizen solely has accomplished as against all Yakima Indians the very thing that the Government alleges Seufert Brothers Company was seeking to accomplish against Sam Williams when he was claiming as a Yakima Indian with Yakima Treaty rights.

VI.

Defendant squarely raised the question in its Assignment of Error No. 7, Brief, page 12, to the effect that

the Court erred in holding portions of the South Bank of the Columbia River in the county of Wasco, State of Oregon, described in the Decree, was or is one of the usual and accustomed places of fishery belonging to and possessed by the confederated tribes and bands of Indians, known as the Yakima Nation, and the record containing the evidence is all before the Court. The Record, Vol. 1, page 68, Vol. 2, page 671, shows that the Record was made up in strict conformity with the rules and the Government cannot now raise the question suggested.

The maps and plats referred to are on file with the Clerk of this Court properly certified and are so bulky and numerous that they cannot be presented in oral argument. Neither is it necessary for a proper understanding of the evidence. We shall not go into this testimony in detail, as it is impossible and as we think unnecessary.

To generalize somewhat the north bank as heretofore suggested furnishes much better fishing places and contains the usual and accustomed places for the confederated tribes and bands of Indians known as the Yakima Indians to take fish.

It is notorious that these upper fishing places on the Washington side were the best places on the river. Every witness on the stand knew or had heard of these places as Indian fishing places and in order to reach the South Bank the Indians had to pass by these good fishing places, cross a dangerous river and go up and down the bluffs from Skein and Wish-ham.

Seufert testifies:

Q. Now then, how are these places at Five Mile Rapids and Celilo as to being good places for Indian fishing—dip net fishing?

A. They are much better than the Oregon side, they are good places.

(Record Vol. 2, page 502.)

Mr. Seufert testified that in the thirteen days from the first until the 13th of May, 1915, he paid the Indians for their catch at these places TWO THOUSAND AND FIVE DOLLARS, and there was still about one third of that time to pay and this was for dip net fishing alone.

(Record Vol. 2, page 502.)

Frank Seufert, Jr., testified that they sometimes buy ten tons a day of fish from these Indians.

(Record Vol. 2, page 556.)

He also testifies that there are forty or forty-five different places at Celilo on the Washington side.

(Record Vol. 2, page 602.)

Whipple testifies as to the good fishing places at Wish-ham on the Washington side at all stages of water early and late.

Fred Smith testifies to the same effect.

(Record, Vol. 2, page 463.)

Wickman testifies that there are seventy to one hundred dipping places in front of the village and on the Washington side.

(Record, Vol. 2, page 607.)

With this in view the fact that the Yakima Nation had ceded the Wenatshapam fishery bank to the United States for a consideration is weighty evidence in favor of the proposition that the Indian wants were satisfied by the fishing rights secured to them in the Treaty on the Washington side and within the ceded territory.

Further we have the direct and positive testimony of fourteen intelligent white witnesses and two Indians, all of whom were in a position of such intimacy that they must have known the habits and customs of the Indians in that regard, who testified directly that the custom was for the tribes on each side of the river to fish on their own side, and that as a matter of fact not only the tribes but EACH PARTICULAR FAMILY of Indians had their exclusive fishing place which they own. Ten of these white witnesses have no interest in this case whatever. This testimony is corroborated in numerous ways, among others by the allegations in the bill of complaint as to the individual and tribal ownership of fishing places.

The testimony of white witnesses who knew the Indians and their traditions and heard their complaints about the Indians fishing on the ~~long~~^{wrong} side of the river ought to carry weight. They were testifying about general conditions in distinction from the individual visiting of Indians from one side to the other.

This testimony cannot be appreciated and weighed without reading. Much that is helpful in arriving at a just conclusion on this point is to be found on pages from 45 to 62 of our original Brief although the discussion of evidence there found is not all on this precise point. And further this question is discussed on pages 62 to 66 of our original Brief. It is to be borne in mind that the Bill of Complaint alleges Sam Williams is the most recent and consistent user of the point in question and the court below found that such place was not a usual and accustomed place of fishery by the Yakima Indians.

Many pages of the Record are taken up by evidence tending to support our contention. We cite only a few, all in Vol. 2 of Record. George Snipes 485, John Crate

545, Eld. Crate 484, Gulick 443, Leo Schanno 668, Rorick 486-498, Fred Smith 462, Charley Switzler 468, F. A. Seufert 498.

Here we leave a discussion of this evidence believing that it is unnecessary and think that such discussion avails little except to indicate in a forcible way that after the Indians have, in the most solemn manner executed a treaty and it has been duly ratified and proclaimed as a part of the supreme law of the land, that the extent of its application should not be determined by verbal testimony taken more than a half century after the negotiation of the treaty. The discussion emphasizes the fact that the provisions and boundaries contained in such treaties should be followed, and all this without any injustice to the Indians ceding territory, for by the very words of their treaty they have undertaken to convey all their right, title and interest in and to the country occupied and claimed by them and having so agreed they cannot be heard to say that they occupied or claimed country outside of the treaty boundaries.

VII.

BEFORE PASSING TO THE DISCUSSION OF OTHER POINTS, WE WISH TO ATTRACT THE COURT'S ATTENTION TO THE FACT THAT ALTHOUGH THE MIDDLE OREGON TRIBES FISHING RIGHTS WERE ALL RELINQUISHED IN 1865, EXCEPT THE RIGHTS ON THE RESERVATION, NO MENTION IS MADE OF THIS FACT BY THE WITNESSES. IT FOLLOWS THAT AFTER THAT DATE THE MIDDLE OREGON TRIBES HAD NO INDIAN FISHING RIGHTS AT ALL ALONG THE POINTS IN CONTROVERSY.

Some members of the Middle Oregon tribes fished, of course, along the Columbia after 1865. What they did was done because there was no objection, other than there would be to the fishing by a citizen and the Yakima visiting the Middle Oregon tribes when they were there fishing with them did so by permission. Neither had any treaty rights to fish on the Oregon shore of the Columbia and their usual places there, and fishing cannot be attributed properly to any treaty or claimed treaty rights.

VIII.

The theory announced, that fishing places were the subject of ownership as alleged in original and amended bill of complaint (see our original brief, page 58) was true and it was asserted in attempting to uphold the claim of Sam Williams, but when the case in his behalf failed it became necessary to contend that there was no such ownership but that the fishing was in common, and this is so because there was no ownership on the part of the Yakima Indians of any fishing place of the southern bank of the river by individuals or families, consequently the changed position on the part of the plaintiff followed.

IX.

IT HAS BEEN SUGGESTED THAT THE GOVERNMENT WILL CONTEND IN THIS CASE, THAT THE QUESTION OF TREATY INDIAN'S RIGHT TO USE MONOPOLISTIC DEVICES USED IN FISHING IS NOT INVOLVED IN THIS CASE. In order to establish the fact that the question

is fairly raised, we call the Court's attention to that part of the decree contained in paragraph 6, page 58, Vol. 1, of the Record wherein it is decreed that the Yakima Indians are not confined to their ancient and usual methods of catching fish but are permitted and are to be encouraged to adopt the more modern and advanced methods and means of prosecuting their fishing enterprises.

We also call attention to the following paragraph on the same page of the Record in which among other things the defendants are restrained from in any manner interfering, preventing or prohibiting said Indians from erecting, maintaining or using temporary houses or buildings upon the following described land, to-wit:

"That certain portion of the rocks of the Columbia River opposite said lots 2 and 3 for the purposes of shelter and occupation while fishing during the fishing season or for the purpose of securing fish during the said fishing season."

Said decree also prevents interference with the Indian's ingress and egress to and from said lands.

Lot 3 referred to is in Section 36, Township 2, North Range 13, East, W. M.

Lot 2 is in Section 1, Township 1, North of the same Range. Both are the undisputed property of the defendants.

From the foregoing it will be seen that the defendants are enjoined in effect from preventing the fishing on the part of the Indians by scow fish wheels fastened to the upland by means of iron pins or otherwise, said chains and fastenings necessarily being above the line of ordinary high water or from building of permanent fish wheels connected with the mainland.

Inasmuch as it is known from the evidence in this case that scow fish wheels can only be held in place by attachments of this kind the water being very swift, that the building of a permanent fishing wheel necessarily involves the attachment of the same to the upland.

It must be perfectly understood from this decree that Seufert Brothers Company would be considered in contempt if they interfered with any appliance placed upon their land that was necessary for the fastening of a scow fish wheel or with the connecting of a permanent fish wheel to the upland, and it is also perfectly well known that it would be necessary for anyone fishing with a monopolistic device so to do,—then why contend that the question is not raised. To be sure it is difficult to understand how that additional servitude could be incorporated into the treaty by construction, but that is a reason only for the reversal of this decree.

In this connection I wish to attract the attention of the Court to the fact that at the time of the ratification of this treaty Oregon Territory had been admitted into the Union as a State.

X.

WAS IT ERROR TO ALLOW THE PLAINTIFF TO FILE AN AMENDED COMPLAINT?

We respectfully submit that the cases cited by the plaintiff, at least so far as we are advised, do not support the contention made by the Government. In the case at bar we do not think that the particular shore covered by the decree is covered or described either in the original or amended bill because the actual point covered is definitely described in both as the point where the right of a fishery is alleged to exist, namely at a point twelve chains West and 28.53 chains North

of the $\frac{1}{4}$ Section Corner between Sections 36, Township 2, North Range 13 East W. M., and Lot 1, Township 1, North, same Range, Wasco County, Oregon. Said place is further identified as the usual place where Sam Williams, as a Yakima Indian was accustomed to fish and where this Indian has driven iron pins into the rocks to which to anchor his scow fish wheel to the south bank of the Columbia River and where the letter and figures O34 are marked upon the rocks, the same being the number of the fishing license issued to Sam Williams for the fishing season of 1913.

Record, Vol. 1, par. IV, pages 3 and 4.

The above is the only fishing place claimed in the original Bill of Complaint.

In the amended Bill of Complaint the fishing place claimed is precisely the same but in addition to claiming it for Sam Williams, a claim is also made for the Yakima Nation.

On page 24, Vol. 1 of Record is found the description of the point claimed in the amended bill and it is precisely the same as in the original bill—but in the amended bill the point is claimed for the benefit of the Yakima Nation of Indians and the most recent and consistent user Sam Williams. The only point claimed is the one of which Sam Williams is the most recent and consistent user and that point is found not to be a usual and accustomed place of fishery.

Further the amended bill does not state a cause of suit against Seufert Brothers as to the portion of the shore covered by the decree and it is not alleged in said amended bill that Seufert Brothers Company have in any way interefered with the Indians fishing along the

shore covered by the decree, or with any Indian except Sam Williams.

It is true that the original bill mentioned the United States as the Guardian of all Indians and Sam Williams in particular, but it no more included or contended for the right of the Yakima Indians in the original bill than it did for any other Indian tribes, but narrowed its contention to Sam Williams.

However, we do not wish to over emphasize a point which does not go to the merits and which we have no interest in except as the main controversy should by some possibility be decided against us.

XI.

Inasmuch as the Government has stated that upon further consideration it does not press its appeal and is content to rest upon the decree no further comment is made with reference to the cross appeal of the United States.

We conclude as in our original Brief and respectfully submit that we are entitled to a reversal.

Respectfully submitted,

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SEUFERT BROTHERS COMPANY.